ADVISORY OPINION NO. 2010-15

Issued On July 8, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An Elected Board of Education Member asks whether he may serve as a football official, for compensation, in the county school system.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a newly elected Board of Education (BOE) Member. He is also a certified football official. [1] The Requester acts as a sports official, for compensation, in games in the public school system in the County where he serves as an elected BOE Member. He also officiates games outside the county. His total compensation for this activity is normally less than one thousand dollars per year.

The West Virginia Code provides that county boards of education "[s]hall exercise the control, supervision and regulation of all interscholastic athletic events...." W.Va. Code § 18-2-25. However, this code section further provides that the county boards may delegate this authority to the West Virginia Secondary Schools Activity Commission (SSAC). One power delegated to the SSAC is the responsibility of certifying sports officials.

When a sporting event is held in a county, according to the SSAC Officials' Handbook, both schools must mutually agree upon the official.[2] The Handbook requires that all officials working athletic events have written contracts with the host school. (SSAC Handbook, Article VI, page 9). The host school normally pays the officials' fees from money collected at the gates of the sporting event. The gate revenue is deposited by the school into a designated school account. The official then receives his or her check from the host school.

The Handbook states that it recommends that officials and school administrators work together to establish a fee structure. (Handbook, Article VII). The fees for coaching vary from county to county. For smaller events, an official may receive $30.00 per game. For larger sporting events, such as a Friday Night Football Game, the official may receive $50.00. Travel expenses are not paid. The officials are independent contractors.

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[1] Only certified individuals may serve as a sports official for secondary school sporting events. These individuals are required to join a local officials' board which is a board compromised of local school and sports officials. To retain their certification, they must attend a rules clinic each year. They are not compensated for attending these clinics. According to the SSAC, there is a shortage of sports officials in the State and it is a challenge to keep and recruit them.

[2] The SSAC's Secondary Schools Activity Handbook states that "Coaches or other persons connected with competing schools shall not officiate at the contest unless the consent of the competing school is given." (Handbook, page 9, 9.2).

It appears that the method for selecting sports officials varies from county to county. In some counties, the local coach, subject to approval by the opposing team, selects the official. In other counties, or for larger sporting events, the local conference will select the official. Coaches rate the officials. A school may refuse to use an official.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(d)(1) provides in part that ... no elected or appointed public official ... or business with which he or she is associated may be a party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control: Provided, That nothing herein shall be construed to make unlawful the employment of any person with any governmental body...

W. Va. Code§ 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result ... in excessive cost, undue hardship, or other substantial interference with the operation of a ...county... the affected government body ... may make written application to the ethics commission for an exemption from subdivision (1) ... of this subsection.

W. Va. Code§ 61-10-15(a) states in part that ... It shall be unlawful for ... any district school officer... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... member, officer... he may have any voice, influence, or control.

ADVISORY OPINION

Both the Ethics Act, W. Va. Code§ 6B-2-5(d)(1), and a separate criminal misdemeanor statute, W. Va. Code§ 61-10-15, prohibit school officials and employees from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

The Ethics Act

Pursuant to W.Va. Code§ 6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. There is a $1,000.00 exception to this provision; provided, that the affected public official does not participate in the review or evaluation of the contract and recuses him or herself from voting on the contract.

Based upon the facts presented, it appears that the Ethics Act would not bar the Requester from serving as a referee in the County where he serves as an elected BOE Member; particularly as his annual compensation for this work is less than $1,000.00. However,

analysis under the Ethics Act is academic in light of the stricter provisions in W.Va. Code § 61-10-15.

West Virginia Code§ 61-10-15

W.Va. Code§ 61-10-15, a separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against any "member of a county commission, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer" who are pecuniarily interested, either directly or indirectly, in the proceeds from a public contract over which the public official may exercise voice, influence or control. Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. Further, this code provision does not contain an exception for employment by a governmental agency or a $1,000.00 exception. *See generally* Alexander v. Ritchie, 53 S.E.2d 735 (W.Va. 1949).

In this matter, the Commission finds that a contract between a school and a sports official constitutes a public contract. As such, the Commission must determine whether an elected BOE Member exercises voice, influence or control over this contract.

Each county school district is under the supervision and control of the County BOE. W.Va. Code§ 18-5-1 *et. seq.* The BOE exercises control over school personnel, including coaches and the principals to whom they report. The Commission finds that an elected BOE Member may not contract with the County school system where he serves to be a sports official as his position as a BOE Member gives him voice, influence and control over all contracts in the County School System.[3] However, he may officiate games in other counties, even if it involves a team from his or her county.

In making this finding, the Commission overrules its holding in A.O. 96-12. In that case, the Commission held that an elected BOE member could receive payments for officiating games. Its holding was based, in relevant part, upon the fact that the referees were paid from local funds raised by the athletic boosters through raffles or the operation of concession stands. However, in contrast, the current rules require the officials to contract directly with the school. Moreover, the sports officials are paid with public funds generated by the schools through ticket sales and related activities.

The Commission recognizes that the Requester and similarly situated individuals may serve as sports officials due to their passion for sports, not necessarily for the money. Further, the Commission recognizes that some BOE Members who serve as sports officials may decline to continue to do so if they are not compensated due to the time and expenses involved. Still, as the Supreme Court has stated:

[3] He may volunteer as a sports official in his county and be paid a nominal sum of $1.00 if such payment is required to trigger liability insurance coverage. *See* A.O. 2005-03 wherein the Commission held that an elected BOE Member could volunteer as a coach.

> West Virginia Code, 61-10-15, implements the public policy of this State, and its provisions are clear and unambiguous. **Although harsh, its objects and purposes are salutary.** The purpose of the statute is to protect public funds, and give official recognition to the fact that a person can not properly represent the public in transacting business with himself. To permit such conduct would open the door to fraud. The statute is designed to remove from public officers any and all temptation for personal advantage.

Alexander v. Ritchie, 53 S.E.2d 735, 739 (1949). (emphasis added). In Fisher v. Jackson, 147 S.E. 541 (W.Va. 1929) the Court held that "to remit a member of a district school board, by reason of nonaction on his part in regard to a particular matter...would defeat the very purpose of the statute." kl at 542. In Alexander the Court further stated:

> If statutes protecting public funds are to have any effect and force, they should not be emasculated by **judicial interpretation and relaxation of their provisions** (emphasis supplied). Common prudence dictates that men holding official positions must not deal with themselves in a private capacity, directly or directly.

J_g_. At 740-741. Based upon the strict language in the statute, the Commission finds that, based upon the facts presented, "relaxation" of the provisions through administrative interpretation would not be consistent with the plain language or intent of the statute.[4]

In closing, when a BOE Member officiates a game within his County School System, he is contracting with his County School System. As such, the Commission finds that an elected BOE Member may **not** serve as a compensated sports official in the County where he serves as a BOE Member. He may volunteer as a referee and receive the nominal sum of $1.00 if required for insurance coverage.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code§ 6B-1-1, *et seq.,* and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ Jonathan E. Turak
JonathanE.Turak,Acling Chairperson

[4] To the extent, if any, that a referee is considered an employee of the school system, this finding is also consistent with the strict provisions in§ 61-10-15 which prohibit county officials, school board members and their spouses from being employed by the county or school district in which they serve. *See* A.O. 2004-10A.